

# ENVIRONMENTAL COVENANTS AND RESTRICTIVE NOTICES IN COLORADO



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# Colorado's Institutional controls legislation

- ▣ 2001 – SB01-145 created environmental covenants
- ▣ 2008 – SB 08-139 created restrictive notices
- ▣ Both are codified in Colorado Hazardous Waste Act

# Colorado Environmental Covenants

- ▣ *Legally enforceable mechanism*
  - Makes land and water use restrictions imposed as part of cleanups enforceable in perpetuity
  - Binding against current & subsequent owners, any person using the land
  - Injunctive relief only; no penalties
  - CDPHE must approve all covenants

# How do covenants work?

- ▣ Covenant created by grant from property owner to CDPHE
- ▣ Must provide notice to others with interest in affected property
- ▣ Recorded in county clerk's office to provide notice to subsequent purchasers
- ▣ Can be modified or terminated with CDPHE approval

# When is a covenant required?

- ▣ Post-July 1, 2001 remedial decisions that rely on land/water use restriction to achieve “safe” levels, or include engineered structure
- ▣ Applies to cleanups under RCRA, CERCLA, UMTRCA, state hazardous waste law, radiation site decommissioning, closure of hazardous and solid waste disposal sites
- ▣ SB 145 does not mandate use of covenants
  - Agency may decide use restrictions are inappropriate, require more cleanup

# The amendments

- ▣ SB08-037 creates a “notice of environmental use restriction” (a/k/a “restrictive notice”)
  - an alternative mechanism to an environmental covenant
  - Functions just like a covenant
  - Explicitly based on state’s police power
  - Not an interest in property
- ▣ Environmental covenant provisions essentially unchanged

# Creating a restrictive notice

- ▣ 3 methods:
  - Department approves proposed notice
  - Department issues notice upon request
  - Department issues unilateral notice when person who is required to create a covenant fails to do so w/in 30 days of cleanup decision/remedy completion
- ▣ Notification/content requirements similar to those for EC's



# Prior interests don't interest you? They should!

- ▣ *If* EC is a property interest, it does not bind prior recorded interest in the property (e.g., lender, owner of severed mineral rights, easement holder), *unless* that entity subordinates its interest thru written agreement
- ▣ Police power mechanism is binding on prior interests, but may cause “takings” issues
- ▣ Solution: always I.D. prior interests by obtaining adequate title information; subordinate prior interests where necessary



# Slickrock UMTRCA site

- DOE cleanup program; NRC oversight
- Pre-2001 remedy: remove tailings, institutional controls for groundwater plume; some residual soil contamination
- NRC wants environmental covenant
- Covenant drafted before title information obtained; prohibited excavation
- Title info showed many potentially conflicting prior interests

# Slickrock UMTRCA site, cont'd.

- Problem: difficult or impossible to obtain multiple subordination agreements, so covenant may not bind prior recorded interests
- Solution:
  - Allow excavation in accordance with soils management plan
  - Substitute restrictive notice for environmental covenant

# Slickrock lessons learned

- Do title review first! It informs:
  - Choice of appropriate mechanism (covenant or restrictive notice)
  - Scope of use restrictions
- By combining a restrictive notice with appropriately tailored use restrictions, can create enforceable controls, while avoiding takings issues and need to obtain subordination agreements that would be required with an environmental covenant

# QUESTIONS?

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